## Section 9(2)(g)(i)

Section 9(2)(g)(i) applies if the withholding of the information is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers and officials.

In considering whether section 9(2)(g)(i) applies, it is not enough merely to assert that disclosure would inhibit free and frank expression of opinions necessary for the effective conduct of public affairs. Three questions must be answered.

1. How would disclosure of the information at issue inhibit the free and frank expression of opinions in future?
2. How would the inhibition of such free and frank expression of opinions prejudice the effective conduct of public affairs?
3. Why is this predicted prejudice so likely to occur that it is necessary to withhold the information in the circumstances of the particular case?

### Information at issue

- Emails and information deleted from the film industry third parties' emails to the Minister in relation to the production of *The Hobbit* – 2010.
- Ministerial adviser's note for the Minister in relation to the production of *The Hobbit* – 2010.
- Information deleted from Ministry of Economic Development reports to Ministers concerning the New Zealand Film Commission, Film Industry Studio Infrastructure and the Asia Pacific Producers Network Conference – 2009/2010. (Some of this information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)

### Application of section 9(2)(g)(i)

*Views expressed within the government sector*

In general terms, the purpose of section 9(2)(g)(i) is to avoid prejudice to the generation and expression of free and frank opinions which are necessary for good government. The ability of Ministers, officials and other advisers to the Government to express their opinions on relevant issues in a free and frank manner is an essential ingredient of the climate necessary for the effective conduct of public affairs. The ongoing nature of the relationships within government and, in the case of public servants, their political neutrality, does justify recognition of a degree of confidentiality in their exchanges within government.

In my view this section applies to some of the information at issue. In particular, it applies to opinions expressed by officials during the development of advice pertaining to screen infrastructure in New Zealand, the review of the New Zealand Film Commission, immigration

policy and other industry issues. It also applies to a note generated by a ministerial adviser for the Minister's consideration prior to a meeting with Warner Brothers.

However, I do not accept the proposition that it applies to the options which were tendered by officials to Ministers in a report dated 28 April 2010 titled *"Film Industry Meeting on Actors Equity and Immigration Issues"*. In this case, by the time of the request Ministers had reached a decision on this matter and some parties had already been advised of it. I note for example that Sir Peter Jackson had discussed the issue with the Minister's Office via email in October 2010. Sir Peter Jackson reported to Tim Hurdle on 18 October 2010:

> *"I'm going to need to bring Warners up to speed about the failure to address the visa issues at today's cabinet meeting. Does Gerry want me to tell them, or is he intending to tell them himself?"*

Tim Hurdle replied to Sir Peter Jackson on 18 October 2010:

> *"It is Mr Brownlee's intention to speak to Carolyn Blackwood tomorrow to explain what decisions have been made. He is more than happy to explain. At the moment, it is a call on timing of the announcement of decision. ..."*

(These emails have already been released by the Minister.)

Furthermore, on 17 December 2010 (the day that Ms Kelly's and Mr Edwards' requests were declined), SPADA e-news #20 reported:

> *"Numbers of production companies experienced issues with obtaining temporary work visas for engagement of offshore personnel during the year and approached SPADA for assistance, often at the eleventh hour when production schedules were already in jeopardy. SPADA put a substantial effort into policy discussions with officials and Ministers on the immigration process during 2010. Only at year's end was an unexpected change signalled, which involves changing the letter of Non Objection process to one of silent approval by guilds in a three day time frame. This change has now been delayed until early 2011."*

In the circumstances, I do not consider that the Minister had good reason to withhold the options which had been identified on the immigration issue. I do not accept that the disclosure of this advice after the event would result in reluctance on the part of officials to provide Ministers with such options. I emphasise too that officials only provided options for Ministers to choose from, they did not recommend a particular course of action themselves. I do not believe that release of this information would inhibit officials in the future from providing Ministers with options for action for Ministers themselves to decide upon.

*Views expressed from outside the government sector*

The application of section 9(2)(g)(i) is not limited to information produced within government. If the elements of this section are established, it can also apply to opinions conveyed to Ministers or officials by third parties.

In this case, section 9(2)(g)(i) was relied upon to withhold submissions and parts of submissions made to Ministers by New Line, Wingnut and SPADA representatives.

The Minister stated:

> *"During September/October 2010 my office was receiving information from multiple sources and it was important for the Government's decision making that we received full information on the different matters that were in play at that time.*
>
> *As a Government we place a high value on the wider community, including business leaders, both in New Zealand and off-shore, being able to provide free and frank views and commercially sensitive information to Ministers. Without this level of communication the Government would, at times, not have the full set of information as it makes decisions. In this situation I am firmly of the belief that we required full information and I know without a doubt that if released, our ability to acquire such information in the future would be seriously compromised. I am also concerned that release of such information would impact on the willingness for other business leaders, again both locally and internationally, in providing their views and information to the Government."*

New Line stated:

> *"If the government is not willing to adequately protect this sensitive information from disclosure, this will operate as a major disincentive to motion picture studios- as well as local and foreign talent – to utilize New Zealand as a location for future productions."*

Wingnut stated:

> *"The emails were an open expression of a free and frank discussion between the key participants in the film industry and Ministers. Public release will undoubtedly prejudice the supply of any further such information between the film industry (especially from Wingnut Films) and the Government.*
>
> *I can categorically assure you that if the above information was released and a similar situation occur in the future, neither myself nor Wingnut Films would be inclined to help the Government again with such a candid level of advice and opinion."*

While I accept that there will be circumstances in which persons may feel inhibited from making submissions by the prospect of those submissions being made public, I am not convinced that this was so in this case. The submissions and comments that were made to Ministers by these parties were made in their own direct interests with a view to persuading the Government to a policy stance that advantaged them in their commercial dealings. There is nothing improper in this and it has not been suggested that there was. But I do not accept that persons who have a commercial interest in making submissions to Ministers would be likely to be deterred from doing so by the prospect of release. They might prefer non-release, but release is a consequence that has to be, and is likely to be, borne with.

I note that by the time of the decision on these requests, similar opinions and information had already been shared in the public domain by the submission makers.[2] I accept that anticipation that one's views on an issue might be released under the OIA (though this possibility was not adverted to in this case) can change the way in which views are expressed. But I do not consider that release would stop third parties from approaching the Government if they considered it was in their commercial interests to do so. I also accept that sometimes the way in which information is expressed can be an important means of communicating the significance of issues and I have considered this too, but having done so I do not consider that there is justification to withhold information on the ground of the particular language used. It does not seem to me that release would discourage or inhibit the free and frank expression of opinions that occurred in this case or that the prospect of release if this had been appreciated would have materially altered its mode of expression.

*Views expressed between organisations not subject to the OIA*

Some of the communications with Ministers had attached to them emails which had passed between organisations which are not subject to the OIA. Different considerations apply to such exchanges.

In cases where the author of such an email knew or can be reasonably assumed to have known that it would be transmitted to the Minister or the department it is effectively a direct communication to the Minister or department and falls to be judged for release on the same principles as those discussed above. But in the absence of such an indication I do accept that the possibility that such communications may be released raises further questions.

Emails between third parties are not themselves communications *"by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation..."* (though they may be embodied in other communications that are). In themselves then, I do not see section 9(2)(g)(i) as being applicable to these emails. Section 9(2)(g)(i) is applicable to the covering email to the Minister or other official source that attaches such an email. I have given my reasons above for concluding that generally release of such emails in this case will not be inimical to the effective conduct of public business. As far as section 9(2)(g)(i) goes the same applies to the incorporation into such an email of a communication from a more remote party.

But I do consider that release of such an email where the author did not know or cannot reasonably be expected to have known that it would be transmitted to a Minister or official raises other potential grounds for withholding. I have discussed emails which falls within this category above in the context of section 9(2)(ba)(i).

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2 For example, Sir Peter Jackson's public statement dated 26 September 2010; comments made by Philippa Boyens and Fran Walsh during an interview with Kathryn Ryan (RNZ) on 21 October 2010; Sir Peter Jackson's response to union action as reported by 3 News on 22 October 2010; SPADA's response to MEAA newsletter 27 October 2010.

## Section 9(2)(h)

Section 9(2)(h) applies if the withholding of the information is necessary to maintain legal professional privilege.

### Information at issue

- Legal advice from a barrister to a film industry third party in relation to the production of *The Hobbit* - 2010.
- Information deleted from emails sent by the film industry third parties to Ministers in relation to the production of *The Hobbit* – 2010.
- Information deleted from an email sent by a Ministerial adviser to Ministers and others in relation to the production of *The Hobbit* – 2010.
- Advice from Crown Law to the Minister for Arts, Culture and Heritage in relation to the production of *The Hobbit* – 2010.
- Letter drafted by Crown Counsel and used by the Minister and the Minister for Arts, Culture and Heritage to respond to a film industry third party in relation to the production of *The Hobbit* – 2010.

### Application of section 9(2)(h)

*Existence of the privilege*

Section 9(2)(h) is an unusual withholding ground because it (subject to any public interest override) grants exemption to a particular class of information. This contrasts with other withholding grounds in section 9(2) of the OIA. These apply by reason of the effect their release has on identified public values (privacy, commercial position, etc). There is therefore, where legal advice is concerned, an element of exemption because of who is the author of that advice.

Solicitor/client privilege applies to confidential communications between a legal adviser and client, where the legal adviser is acting in his or her capacity as such, and the communications are for the purposes of obtaining or giving legal advice.

In this case there are a number of documents which contain communications between legal advisers and their clients, where the clients are either the Crown or third parties.

I am satisfied that the communications in question were subject to solicitor/client privilege at the time they came into existence. In the circumstances, subject to any waiver of the privilege, withholding the information is "necessary... to maintain legal professional privilege" within the meaning of section 9(2)(h).

*Waiver*

Successive Ombudsmen have taken the view that it would not be *"necessary"* to withhold privileged information if the circumstances are such that, were legal proceedings to be issued, a Court would be likely to hold that the privilege had been waived. I have considered whether in all the circumstances the conduct of Ministers has been inconsistent with maintaining the confidentiality of the privileged material.

A party is entitled to waive legal professional privilege and disclose or acquiesce in the disclosure of legal advice. Furthermore, waiver need not be express, but can be implied and contrary to the intentions of the party claiming it. However, disclosure to a particular person or organisation will not amount to waiver unless done so in circumstances where it can be said that the holder of the privilege is abandoning the right to keep the information confidential.

It is accepted that, in principle, there is a particularly strong public interest in the maintenance of legal professional privilege. It is not to be lightly considered to have been lost. As the Privy Council said:

> *"A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he [the client] consent in future to disclosure for a limited purpose those limits will be respected."*[3]

This passage confirms that a person is able to limit the extent to which privileged material is disclosed without necessarily waiving the privilege entirely.

Ms Kelly contended that the legal professional privilege which attaches to a Crown Law opinion has been waived.

There were a number of reasons put forward for this. First the Attorney-General /Minister for Arts, Culture, and Heritage in a letter to the studios of 29 September 2010 referred to legal advice which the Government had obtained.

Secondly, Ms Kelly noted that the Attorney-General/Minister for Arts, Culture, and Heritage had advised her that the opinion had been provided to Sir Peter Jackson and Warner Brothers. Consequently, it was, she said, unfair to deny access to other members of the public. She also noted that *"significant content of the Crown Law opinion, but not all of its content was disclosed by the Attorney-General to the public at large to claim publicly that a group of New Zealand citizens (film workers) were acting unlawfully, and that effectively their claimed rights to freedom of association did not extend to collectively negotiating conditions of work in the context of the Hobbit dispute"*.

[3] *B v Auckland District Law Society* [2004] 1 NZLR 326 at ]71].

This question of the "fairness" of maintaining the privilege is a concept that has been explored by the Courts. The approach of the courts to waiver is that set out in the Opthalmological Society case[4] and is summarised in *Shannon v Shannon*[5] as follows (at [56]):

> *"The Court recognised that the fairness factor can be important in cases where there has been partial disclosure of legal advice and the consideration is whether natural justice requires disclosure of the whole advice. What must be assessed objectively in all cases, however, is the consistency of the conduct with maintaining the privilege. That requires close analysis of the particular context, what the issue is in relation to the privilege, how the evidence relates to that issue, and the question of whether there is inconsistency that could lead to injustice if the privilege is upheld. The weight to be given to fairness will depend on the circumstances, including the character of the privilege said to have been waived".*

Ms Kelly submitted:

> *"The Government was a third party to this dispute and chose to support the decision of an employer not to negotiate with a union, and to do so in an very public manner by using the offices of the Crown to seek legal advice in support of that employers position and then publicly release it to generate pressure on the union to drop its claim."*

However, the Government has not released the legal advice it has received. The comments made were restricted to disclosing that the Government had obtained legal advice confirming that the Commerce Act 1986 prevented producers from entering into a union-negotiated agreement with performers who are independent contractors. These comments are akin to those referred to in the Shannon case. That is, they refer to the existence of legal advice as being the basis for a position which has been taken. They do not amount to waiver.

The Government is entitled to request legal advice in any circumstances, just as any individual person is. In this case the fact that the Government went on to make it known that it had obtained legal advice and that the advice supported the movie producers' stance is not, in my view, sufficient evidence that it has waived privilege in that advice.

It should be noted that in the *Shannon* case, not only did the Court hold that there had been no waiver on the facts of the case, but also observed (at [59]):

> *"For completeness, we note that we are not to be taken as accepting that, if [Mrs Shannon] had referred to the existence of legal advice as being the basis for her honest belief, she would be held to have waived privilege. To the contrary, we consider that a bare statement of this kind would not normally waive privilege."*

As to the question of whether it is *"unfair"* for the Attorney-General/Minister for Arts, Culture and Heritage to be able to make a public statement and then claim legal professional privilege

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[4] *Opthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 at ]38]

[5] [2005] 3 NZLR 757

in order to avoid any request that might arise to back the statement up, it is clear from the *Ophthalmological Society* and *Shannon* decisions that general notions of *"unfairness"* in this context are not enough for waiver to occur. In particular, in Shannon, the Court of Appeal agreed with the comments in an article by D L Mathieson QC and Julian Page,[6] where the authors distinguished between the unfairness caused by reliance upon the substance of privileged evidence to advance a legal claim, while at the same time denying the other side access to that evidence, and the unavoidable "unfairness" caused by every assertion of privilege.

More generally, in my view, these considerations of unfairness arose in the context of legal proceedings where it is easy to see that the interests of justice may require a court to consider such a factor in a particular case.

It is not so easy to see their relevance when what is in issue is access to official information rather than the determination of the legal rights of parties to litigation. In the former case the OIA itself identifies the values to be promoted and protected. It is questionable whether considerations of fairness based on natural justice concerns do enter into an assessment of whether a legal professional privilege subsists for the purposes of section 9(2)(h). While I am satisfied that no "unfairness" in the sense discussed in the cases exists in this case, I doubt its applicability to a consideration under the OIA (as opposed to during discovery in legal proceedings).

As regards the disclosure of the opinion to Warner Brothers and Sir Peter Jackson, I have been advised by the Attorney-General's office that the opinion was provided to these parties on the clear understanding that it was subject to an obligation of confidence. The Attorney-General was not waiving legal professional privilege in providing it. There is nothing which I have seen which indicates that this obligation has not been respected.

*Conclusion on legal professional privilege*

If there has been no implied waiver and the holder of the privilege does not wish to waive privilege, then the withholding of the information *is* necessary to maintain legal professional privilege. The Government's ability to withhold legal advice does not vary depending on the context in which the need for that advice was generated (litigation, commercial, policy, etc). As noted above, the exemption is predicated on the source of the advice.

My conclusion is that section 9(2)(h) does apply in respect of the material that was withheld as being subject to legal professional privilege.

## Section 9(2)(j)

Section 9(2)(j) applies if the withholding of the information is necessary to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).

[6] *Implied Waiver of Privilege* [2000] NZLJ 355.